not require AT&T to include such codes in its orders. Falcone/Gerson Aff., ¶ 29; Bryant Aff., ¶ 54. Had Ameritech met the Commission's January 1 deadline, much of that work could have been done by now. Ameritech cannot be granted interLATA authority even as it imposes new development work on CLECs, work that could already have been done had Ameritech not withheld essential OSS information in violation of a clear Commission directive.

2. Business Resale: AT&T currently is unable to order electronically any of the services that are essential for business customers, including PBX, Centrex, ISDN, and private line. Here, too, Ameritech entirely failed to comply with the January 1, 1997, deadline. It made only very limited information regarding business ordering available until April, 1997, when it appended eight volumes of ordering guides to testimony filed in the Illinois 271 proceeding. None of these volumes had been provided to AT&T before then. Connolly Aff., ¶¶ 171-172.

While these volumes do address business ordering, they do not contain information sufficient to permit CLECs to order business services electronically and on a nondiscriminatory basis. They contain no information at all as to how CLECs are to do EDI ordering of the complex White Pages directory listings that business typically use, nor do they contain all of the necessary information for CLECs to order the hunting arrangements that PBX customers typically demand. Id., ¶¶ 175-179. And even where information is provided, it often indicates that manual processing is still required. Id., ¶¶ 175-176. Given the tardy delivery of incomplete specifications, it should come as no surprise that no CLEC today is able to offer business customers in Michigan anything approaching a complete line of resold services. Id., ¶ 168.

3. Residential Resale: Two of the states in Ameritech's region -- Illinois and Wisconsin -- have conducted evidentiary proceedings to permit them to determine whether

Ameritech in fact is providing nondiscriminatory OSS access. These proceedings have involved significant discovery, depositions, and cross-examination of witnesses, and have focused extensively on the status of residential resale ordering. Based on these factual records, the Wisconsin Commission and the Illinois staff have each concluded that Ameritech has not yet met its duty to provide CLECs with nondiscriminatory access to OSS. Connolly Aff., ¶¶ 92-101.

These conclusions reflect the fact that, notwithstanding Ameritech's recent efforts to supply meaningful ordering guides and attend to long-ignored system problems, Ameritech still cannot process even simple residential POTS resale orders with anything approaching the promptness and reliability that its own orders receive. The reason, as Mr. Connolly explains in his affidavit, is that Ameritech has not performed the work needed to ensure that CLEC orders, once received at Ameritech's gateway, can then be processed electronically by Ameritech's back-end legacy systems. Connolly Aff., ¶¶ 74-76. Properly formatted CLEC orders continue to trigger inexplicable "reject" messages or "fall out" for manual processing, while other orders continue to be rejected because Ameritech refuses to provide vital coding information. Id., ¶¶ 117-133. Ameritech's heavy reliance on manual processing in turn slows down the processing of orders, increases the potential for error, and makes it more difficult to expand capacity. Connolly Aff., ¶¶ 134-138; Bryant Aff., ¶¶ 140-146. And Ameritech has not demonstrated the capacity to handle appropriate volumes of orders, for it was unable properly to process increases in AT&T's orders even when those increases were less than one-third of Ameritech's claimed OSS capacity. Bryant Aff., ¶¶ 84-85, 91-103.

As a result, AT&T and its customers continue to suffer the effects of inadequate service from Ameritech. Hundreds of new AT&T local customers continue to receive bills from Ameritech, reflecting Ameritech's failure to fix longstanding double-billing problems. Connolly

Aff., ¶¶ 228-231; Bryant Aff., ¶ 202. Ameritech has unilaterally extended the service-start date of thousands of new AT&T customers -- 46% in Michigan and 49% in Illinois in the week of May 18, 1997, when Ameritech filed its Section 271 application -- beyond the date that Ameritech originally committed to provide. Bryant Aff., ¶ 87. And Ameritech does not reliably provide AT&T with vital "855" notices that AT&T needs to be able to confirm the status of an order with its customer and to process any changes to the order that a customer may want. Bryant Aff., ¶¶ 110-116.

The delays in order confirmation and completion that Ameritech is imposing upon CLECs and their customers have no analogue in Ameritech's order processing for its own retail customers. Similarly, the manual processing that Ameritech uses for CLEC orders is intolerable to Ameritech itself: For its own orders, Ameritech has so reduced the need for manual processing that it does not even keep records as to its occurrence. Connolly Aff., ¶¶ 78, 112. The most extraordinary example of Ameritech's double-standard is set forth in the April 21, 1997 letter of Ameritech's Executive Director of Federal Relations to the Chief of the Commission's Common Carrier Bureau. In that letter, Ameritech explains that, before it can enter the long-distance market with the level of quality and reliability that customers expect, it must demonstrate its ability accurately to process 20,000 orders per day. Yet Ameritech claims to be operationally ready for residential resale even when it has denied CLECs the information, cooperation, and internal systems development necessary properly to process 20,000 CLEC orders per month. Connolly Aff., ¶ 18.

Ameritech's witnesses first began testifying that Ameritech's OSS were fully operationally ready in December, 1996 -- a time when testing had barely begun, when Ameritech continued to resist providing CLECs even the most basic cooperation, and when error rates exceeded 50

percent. Connolly Aff., ¶ 12. Under the scrutiny of extensive state proceedings in Illinois and in Wisconsin, Ameritech was forced to confront numerous defects in its systems that precluded CLECs from having access to Ameritech's OSS in a manner comparable to what Ameritech enjoys, and to begin responding to these problems. Id., ¶¶ 15, 87-93, 98-101, 247. But by relying on manual processing to "fix" the problems, Ameritech has simply introduced additional delay and a new source of error into the system. Connolly Aff., ¶¶ 134-138; Bryant Aff., ¶¶ 140-146. Were it to obtain interLATA relief before these underlying system errors are corrected, Ameritech will lose all incentive to continue to resolve ongoing difficulties that preclude Ameritech from providing nondiscriminatory end-to-end electronic processing of CLEC residential resale orders.

4. **Nondiscriminatory Access:** Finally, Ameritech has not demonstrated that the access being provided to CLECs is in fact at least "the same" as, or "equal to," the OSS access that Ameritech provides to its own customer service representatives in terms of its availability, timeliness, accuracy and completeness. See Local Competition Order ¶¶ 315-16; 518-19; 523; Pfau Aff., ¶¶ 10-11. In turn, "the ability to test whether parity exists or whether discrimination is taking place is dependent on the existence of explicit and specific performance measures and the reporting of results." Pfau Aff., ¶ 11 (quoting Justice Department's Friduss Affidavit). Ameritech's performance reports not only are inadequate to serve that end, they demonstrate that Ameritech is not providing nondiscriminatory OSS access.

First, Ameritech's performance reports do not permit meaningful comparisons between Ameritech's performance for CLECs and its performance for itself. Indeed, not one of the performance reports submitted by Ameritech for the timeliness, availability or reliability of the OSS access provided to CLECs provides any information whatever regarding Ameritech's

performance for its own local retail operations. See Mickens Aff., Schedules 25-27; Pfau Aff., ¶¶ 15, 40.

Second, Ameritech's proposed performance reports are inadequate because nearly all of them report only a percentage exceeding some "target" level selected by Ameritech. That approach conceals the actual levels of Ameritech's performance for the groups being compared and is prone to manipulation. For example, although Ameritech has conceded that it should be able to return a firm order confirmation ("FOC") to the CLEC "within minutes" of its receipt of an order, Ameritech submitted performance reports in Illinois on May 7, 1997, in which it employed a 24-hour target for the return of FOCs. Pfau Aff., ¶¶ 21, 47. When Ameritech's actual performance failed even to satisfy that overly generous target, Ameritech simply increased its 24-hour target interval to targets of 48 hours and even 96 hours in an attempt to make its performance appear to meet its "contrived" target. Id., ¶ 21, 47.

Finally, Ameritech's own data show that it is not providing adequate performance to CLECs. Pfau Aff., ¶¶ 23, 41, 47, 64. For example, Ameritech concedes that its pre-ordering cycle time for CLECs is two to three times longer than for its own retail agents. See Mickens Aff., p. 38. Similarly, even using Ameritech's most inflated 96-hour target for the return of FOCs, Ameritech's performance reports show that it failed to meet its 96-hour target for the return of FOCs for POTS service 25.0 percent of the time in March and 45.5 percent of the time in April. See id., Schedule 22, sec. 2, p. 8. And Ameritech's performance reports for billing timeliness show that Ameritech failed to meet its own target for the delivery of AEBS files over 90 percent of the time during the first four months of 1997, and 100 percent of the time in both February and March 1997. See id., Schedule 25, sec. 2, p. 10. Ameritech has thus failed to establish that it is providing CLECs with parity of performance.

F. Ameritech Has Not Fully Implemented Its Obligation To Provide Access And Interconnection In Accordance With §§ 251(c) And 252(d)

Ameritech also has not complied with the checklist's interconnection and network element pricing standards.[11] Section 271(c)(2)(B)(i) of the Act mandates that a BOC "provide interconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1)." Thus, as a precondition to providing interLATA services in Michigan, Ameritech must provide, inter alia, interconnection and unbundled network elements at rates that are "just, reasonable, and nondiscriminatory," 47 U.S.C. § 251(c)(2), and "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)," id. at § 252(d)(1)(A)(i). The Commission in its Local Competition Order recognized that only rates based on forward-looking, efficient costs satisfy these standards. Id., ¶¶ 690-93. Rates that recover embedded or opportunity costs do not comply with the Act. Id., ¶¶ 704-11.

The burden of proving that Ameritech's rates for interconnection and unbundled elements meet the statutory requirements is on Ameritech. The Commission's Order is unequivocal on this point. Local Competition Order, ¶ 680. Ameritech has not sustained its burden.

First, with respect to the interim rates on which Ameritech relies, the record is plain that these rates have not been found to be and are not cost-based. With its application, Ameritech has submitted nothing more than the bare assertions of its expert that the interim rates are cost-

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[11] As the Commission has explained, the Eighth Circuit's stay order did not "empower[] state commissions" to "bind the federal government on the core issues of federal law presented in Section 271 proceedings." See Reply Brief of FCC and United States on Application to Vacate Stay, Federal Communications Commission, et al. v. Iowa Utilities Bd., et al. No. A-299 (S. Ct. October 30, 1996). Accordingly, as Ameritech effectively concedes (Br., p. 4 n.5), the Commission in a Section 271 proceeding must independently scrutinize Ameritech's prices to ensure their compliance with Sections 251(c) and 252(d) regardless of any findings by the State commission.

based, and no cost-studies or other evidence that would permit the Commission to determine whether Ameritech had met its burden of proof on this point. Henson Aff., ¶¶ 11-12. Although Ameritech suggests that the MPSC has determined that Ameritech's rates are cost-based, that is incorrect. In fact, the MPSC, consistent with the views of its staff and the Michigan Attorney General, has recognized that the cost studies supporting Ameritech's current rates are "flawed." Id., ¶ 22. Moreover, the interim network element rates relied upon by Ameritech in its application are well above any reasonable measure of forward-looking costs. Id., ¶¶ 25-28. Accordingly, Ameritech has failed to demonstrate compliance with its checklist obligation of offering interconnection and access to unbundled network elements at cost-based rates.

From a business perspective, however, it is the permanent prices -- yet to be set -- that are of greatest concern. Ameritech has proposed permanent rates that are even higher than the excessive interim rates that nominally are now in effect. For example, Ameritech's purportedly "cost-based" prices for the unbundled loop and switch, if multiplied by the number of Michigan access lines that Ameritech currently serves, would exceed Ameritech Michigan's entire operating expenses in 1996. Id., ¶ 35. The failure to establish cost-based rates thus provides independent grounds for denying Ameritech's application.

G. Ameritech Is Not Complying With Its Interim Number Portability Obligations

Ameritech has also failed to comply with its obligation to provide interim number portability ("INP") in "full compliance with [the Commission's] regulations." 47 U.S.C. § 271(c)(2)(B)(xi). Under the Commission's regulations, until permanent number portability is implemented, Ameritech must provide interim number portability through remote call forwarding, direct inward dialing, "or any other comparable and technically feasible method,

as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier."[12]

Ameritech refuses to provide one important INP method: route index - portability hub ("RI-PH"). The evidence is clear that RI-PH is "comparable" to remote call forwarding and direct inward dialing, for each of them makes use of existing switch and network functionality to provide number portability, without significant investment in the development of new hardware or software. Evans Aff., ¶ 48. The record is also overwhelming that RI-PH is technically feasible: (1) the Commission has previously found that RI-PH is simply a "derivative" of remote call forwarding and direct inward dialing (id., ¶ 49); (2) Ameritech itself (in a less guarded moment) admitted that RI-PH is feasible (id., ¶ 50); and (3) local exchange carriers in more than half of the States -- including the Ameritech state of Indiana -- have either voluntarily agreed or been ordered to provide RI-PH. Id., ¶¶ 51-53.

Nevertheless, at Ameritech's insistence, and without any finding that RI-PH was not technically feasible, the MPSC relegated it to the BFR process. Ameritech has said that it will not conduct any further analysis and that it considers the BFR (and thus this issue) closed. Id., ¶ 57-58. Without RI-PH, AT&T will be placed at a significant disadvantage in competing for medium to large-sized business customers, particularly with respect to the pathbreaking facilities-based local service known as AT&T Digital Link which AT&T intends soon to offer. Id., ¶¶ 23-46. Unless and until Ameritech can demonstrate that CLECs have access to RI-PH on reasonable terms and conditions, it has not fully implemented its INP obligations.

* * *

[12] 47 C.F.R. § 52.27; Telephone Number Portability, 11 FCC Rcd. 8352, 8408, 8410-8412 (1996), ¶¶ 110, 115.

In sum, Ameritech has already demonstrated its willingness deliberately to abandon written commitments (e.g., shared transport), to defy commission orders (e.g., intraLATA toll dialing parity, shared transport, access), to delay compliance with unfounded claims of technical infeasibility (e.g., customized routing, RI-PH), and to deny competitors parity of access (e.g., OSS).[13] This extraordinary record confirms the importance of enforcing the statutory requirement that Ameritech demonstrate that it is actually providing each checklist item to competitors on terms and conditions comparable to what it receives before finding compliance with the competitive checklist.

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[13] Ameritech has yet fully to implement other aspects of its interconnection agreement with AT&T. At Ameritech's urging, the interconnection agreement left out many important terms, including prices and most of the details concerning the procedures for processing requests for access to poles, ducts, conduits, and rights of way, to be negotiated by an implementation team that was established by the agreement precisely to address the implementation issues that could not be resolved within the statutory negotiation period. Johnson Aff., ¶¶ 5, 7, 8. Far from reaching agreement on such terms, however, Ameritech is now refusing to abide by terms and intervals to which it had previously assented. Lester Aff., ¶¶ 23-28. Indeed, in an attempt to show full implementation of its rights-of-way obligations, Ameritech submitted "Structure Access Guidelines" with its Section 271 application -- but those guidelines conflict in material respects with the guidelines Ameritech provided to AT&T two days prior to its filing here. Id. Ameritech should identify which set of guidelines it intends to follow (and intends to rely upon in this proceeding). Similarly, despite intensive efforts by the parties, many other vital implementation issues remain unresolved. Johnson Aff., ¶¶ 15-36.

These intensive implementation efforts also underscore the obvious misreading of a single provision of the interconnection agreement by the MPSC. In its Comments on Ameritech's prior application, the MPSC erroneously suggested that AT&T was not scheduled to enter the local market in Michigan until the second quarter of 1998. See Comments of Michigan Public Service Commission, CC Docket No. 97-1, pp. 8, 20, 23, 31, 47 (filed February 7, 1997) (relying on Schedule 2.1 of the Agreement). To the contrary, the Agreement expressly states that the parties will interconnect "on or before" the dates set forth in Schedule 2.1. Agreement, Art. 2.1. More importantly, Schedule 2.1 applies only to forms of market entry that require interconnection (see id.). Thus, Section 2.1 is simply irrelevant to certain critically important forms of entry -- including total services resale and entry via the UNE-platform -- which AT&T is vigorously pursuing. Medlin Aff., ¶¶ 13-19.

II. AMERITECH HAS NOT DEMONSTRATED THE PRESENCE OF A COMPETING FACILITIES-BASED PROVIDER

Although Ameritech's application can be and should be denied without reaching any other issues, Ameritech has also failed to satisfy another element of Track A: § 271(c)(1)(A)'s requirement that there now be "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers" in the state who use "exclusively" or "predominantly" their "own telephone exchange service facilities." § 271(c)(1)(A). Ameritech seeks to satisfy this "facilities-based competitor" requirement by relying on the limited services that three small CLECs (Brooks Fiber, MFS, and TCG) today offer in Michigan. These carriers -- of which only Brooks provides residential service -- are plainly insufficient to satisfy the terms and purposes of § 271(c)(1)(A).

A. There Are No "Competing" Facilities-Based Providers In Michigan

First, none of the three firms is a "competing provider" of local service. The basic purpose of § 271(c)(1)(A)'s "facilities-based competitor" requirement is to provide tangible evidence that the competitive checklist truly has been fully implemented and that the statute is working, as Congress intended, to open local markets to meaningful competition. As was explained by the House Report, the presence of "a facilities-based competitor that is providing service to residential and business subscribers is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the 'openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements."[14] Because the checklist items must allow competitively significant alternatives to be offered on a statewide

[14] H.R. Rep. No. 104-204, at 76-77 (1995); see H.R. Conf. Rep. No. 104-458, at 147 (1996) (facilities-based competitor requirement adopted "virtually verbatim" from House bill).

basis, the facilities-based competitor requirement can be met only by firms that offer competitively significant services that constrain the BOC.

That is why subparagraph (c)(1)(A) requires proof not simply of an "unaffiliated provider" of telephone exchange service, but of an "unaffiliated competing provider." § 271(c)(1)(A) (emphasis added). It is elementary that every word of a statute must, if possible, be given independent force. Moskal v. United States, 498 U.S. 103, 109-110 (1990); United States v. Menasche, 348 U.S. 528, 538-539 (1955). In this instance, providing independent meaning to the term "competing" is not only possible, but is essential to preserving the Act's central purpose of opening local markets to competition. For the word "competing" to have independent meaning (and for section 271(c)(1)(A) to be effective), Ameritech must establish the presence of a truly "competing" provider -- one that is sufficiently evolved to put pressure on the incumbent and to demonstrate that the competitive checklist is actually working.

This reading is confirmed by the third sentence of subparagraph (c)(1)(A). There, Congress specified that the presence of providers of cellular service and of exchange access was not to be considered "[f]or the purpose of this subparagraph." Section 271(c)(1)(A). Congress also determined that resale is inadequate for these purposes. The fact that Congress expressly excluded consideration of alternate providers of local exchange service that imposed no market discipline on the BOC starkly confirms that Congress intended the facilities-based competitor requirement to be a meaningful one.[15]

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[15] The requirement of a truly competing provider is fully supported by the legislative history. The Conference Report characterized section 271(c)(1)(A) as requiring "meaningful facilities-based competition," and anticipated competition from "large, well established" cable companies "such as Time Warner and Jones Intercable" which Congress thought were "actively pursuing plans to offer local telephone service in significant markets." H.R. Conf. Rep. No. 104-458, at 148 (1996) (emphases added).

None of the CLECs relied on by Ameritech to satisfy its Section 271(c)(1)(A) requirement (Brooks Fiber, MFS, and TCG)[16] are truly competing providers of local exchange services, for these firms do not, either individually or collectively, offer a choice to more than a small fraction of Michigan customers. Starkey Aff., ¶ 32-36. Even combining all of the access lines served by these carriers with all of the access lines served by MCI, at most they serve approximately 68,000 lines, excluding resale. Starkey Aff., ¶ 33. This is only slightly more than one percent of the access lines served by Ameritech in Michigan. Id. And while Ameritech trumpets the growth in these providers' access lines, Ameritech itself added more than 232,000 new access lines in 1995, and at least 145,000 new access lines in 1996 -- figures that dwarf the entire CLEC market. Starkey Aff., ¶ 23.

Nor will Brooks Fiber, TCG or MFS provide meaningful competition anytime soon. TCG and MFS serve only the Detroit area, and the loops that they serve constitute less than 1.6% percent of the lines Ameritech serves in that area. Starkey Aff., ¶ 34. Brooks Fiber operates primarily in Grand Rapids, and even there its operations account for only about 1.6% of the market, at best. Starkey Aff., ¶ 35. In view of the purposes of Track A, none of these carriers can be found to be a "facilities-based competitor" of Ameritech.

B. These CLECs Do Not Serve Both Business And Residential Customers Predominantly Over Their Own Telephone Exchange Service Facilities

In addition, even if these CLECs could somehow be deemed "competing provider[s]," they do not satisfy § 271(c)(1)(A)'s additional requirement that they serve residential and business subscribers at least "predominantly over their own telephone exchange service

[16] Although Ameritech labels MCI "facilities based," it makes no claim that MCI is a predominantly facilities-based "unaffiliated competing provider" within the meaning of Section 271(c)(1)(A).

facilities." § 271(c)(1)(A). Indeed, the only way that Ameritech can claim that Brooks -- which is the only one of the three CLECs that provides residential service -- satisfies this requirement is by claiming that unbundled network elements that are obtained from an incumbent LEC constitute the CLECs' own facilities.[17] But Section 271(c)(1)(A)'s terms and purposes foreclose this claim.

The opening sentence of Section 271(c)(1)(A) provides:

> A [BOC] meets the requirements of this subparagraph if it has entered into one or more binding agreements . . . under which [the BOC] is providing access and interconnection to its network facilities for the network facilities of one or more competing providers of telephone exchange service . . . .

§ 271(c)(1)(A). This sentence contemplates two sets of "network facilities" -- the BOC's and the competing provider's -- and an agreement through which the BOC provides "access" to its facilities for the competing provider's facilities. Therefore, the unbundled network elements to which access is provided must be part of the BOC's facilities. Correspondingly, the competitor's facilities for which access and interconnection is obtained cannot logically refer to the very unbundled elements provided by the BOC.

The second sentence of Section 271(c)(1)(A) strongly supports this construction of the first sentence:

> For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange

[17] According to Ameritech, Brooks Fiber leases two-thirds of its loops from Ameritech, so its overall business is predominantly UNE-based. See Harris/Teece Aff., p. 47. Further, Ameritech provides no evidence that Brooks Fiber uses any of its own loops to serve residential (as opposed to business) subscribers. In order to qualify as a facilities-based competitor, however, an unaffiliated provider must own, at the very least, a predominant share of its residential customers' loops.

> service facilities in combination with the resale of the telecommunication services of another carrier.

§ 271(c)(1)(A). The phrase "their own telephone exchange service facilities" in this second sentence necessarily refers to the same "network facilities" that are attributed to the competitor in the first sentence -- which, as shown above, do not include unbundled elements. Moreover, the use of the word "own" indicates that the competitor must have an ownership interest in the facilities. A competing provider using a BOC's unbundled elements has no such interest.

Congress had strong reasons to distinguish between true facilities-based competition and the provision of local exchange service over unbundled BOC network elements. A CLEC that leases unbundled elements from a BOC remains dependent on the BOC, and it is vulnerable to discrimination in the provisioning and maintenance of the leased elements. Starkey Aff., ¶ 41; Allen/Gropper Aff., ¶¶ 15-49. In particular, loop discrimination is likely to be highly effective: It is difficult to prove that such anticompetitive conduct is purposeful, and CLEC customers will inevitably blame the CLEC for the resultant reduction in quality and service. Allen/Gropper Aff., ¶¶ 40-41. The provision of competing service through unbundled network elements thus can never discipline a BOC as effectively as provision of competing service through a CLEC's own facilities. For this reason, Section 271(c)(1)(A) requires the existence of truly facilities-based competitors who are serving business and residential customers predominantly over facilities that are alternatives to LECs' unbundled elements.[18]

[18] In all events, if unbundled network elements ever were to be considered "facilities" for purposes of Section 271(c)(1)(A), it could only be after the BOC has fully complied with all of the pricing and other duties necessary for network elements to approximate what a CLEC would enjoy if it had, in fact, constructed its own facilities. As demonstrated in Part I, Ameritech cannot meet that test.

III. AMERITECH HAS NOT DEMONSTRATED THAT IT WILL CARRY OUT INTERLATA AUTHORIZATION IN ACCORDANCE WITH SECTION 272

Section 271(d)(3)(B) requires the Commission to deny Ameritech's application unless it finds that the "requested authorization will be carried out in accordance with the requirements of section 272." This Commission has made clear that it anticipates its review of Section 272 compliance will be meaningful and vigorous.[19] Ameritech's attempt to meet its substantial burden under Section 271(d)(3)(B) is fatally deficient for at least three reasons.

First, Ameritech cannot meet its burden under Section 272 without bringing to light the details of all its past transactions with ACI, which it appears Ameritech has refused to do. Goodrich/McClelland Aff., ¶¶ 23-33. For example, Ameritech has advised the Commission that it has been involved in a massive amount of development in anticipation of entering the interLATA market:

> In preparing to enter into the long distance business, Ameritech has started from scratch -- both the facilities based portion of its network and the operational systems that support it are brand new. Ameritech has developed twenty-seven major systems that must all interface and interoperate together. These systems include ordering, provisioning, rating and billing systems -- systems which are the core of any business. It is the largest development and implementation of support systems in the chosen configuration in the country -- ever. It consists of five million lines of software code and 300 interfaces. It must be exhaustively tested, tuned, and refined before Ameritech enters the long distance market.[20]

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[19] In the Non-Accounting Safeguards Order, the Commission pointed to the "disclosure requirements" under Section 271(d)(3)(B) as a justification for declining to impose certain additional Section 272 reporting requirements for BOCs. See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No.96-149, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996) at ¶ 323 ("Non-Accounting Safeguards Order").

[20] Goodrich/McClelland Aff., ¶ 25 (quoting Letter from Lynn S. Starr, Ameritech, to Regina Keeney, FCC, dated Apr. 21, 1997). This level of development also raises serious questions of discrimination by Ameritech in favor of ACI, given Ameritech's lack of cooperation with potential competitors, including AT&T, regarding OSS development. Bryant Aff., ¶¶ 22-45.

Yet despite this tremendous level of systems development and testing, Ameritech has not disclosed a single transaction with ACI that concerns OSS or otherwise appears connected with this development. Without a detailed disclosure by Ameritech and ACI of these apparent transactions, and planned remedial action to ensure that ACI does not enter the interLATA market with unlawful and improper advantages, the Commission cannot find that Ameritech will carry out the requested interLATA authority in accord with Section 272.

Second, Ameritech has acknowledged that many of its past transactions with ACI followed accounting rules that have since been rejected by the Commission as inadequate to protect against improper subsidization of Section 272 affiliates by incumbent LECs.[21] Despite acknowledging this fact, however, Ameritech does not present any evidence of its efforts or plans to identify and remedy any cross-subsidization and discrimination that may already have occurred and must be rectified so that ACI does not enter the interLATA market with unlawful advantages from Ameritech.

Third, the transaction information that has been disclosed by Ameritech and ACI is largely devoid of the kind of detail needed to evaluate their compliance with Section 272 and the Accounting and Non-Accounting Safeguards Orders.[22] Many of the agreements posted on

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[21] See Earley Aff., ¶ 30; Shutter Aff., ¶ 10. As the Commission found in the Accounting Safeguards Order, the accounting rules of Parts 32 and 64 that Ameritech asserts that it followed were inadequate to "ensure that the transactions between carriers and their nonregulated affiliates take place on an 'arm's length' basis, guarding against cross-subsidization of competitive services by subscribers to regulated telecommunication services." Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-150 (rel. Dec. 24, 1996) ¶ 147 ("Accounting Safeguards Order").

[22] Goodrich/McClelland Aff., ¶¶ 20-22. The Accounting Safeguards Order requires "that the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules." Accounting Safeguards Order, ¶ 122.

ACI's website are silent on the rates for the services, except to say generally that such rates will be determined by following the valuation rules in the Accounting Safeguards Order. Goodrich/McClelland Aff., ¶¶ 34-41. At the very least, any disclosure of affiliate transactions must include the actual rates to be paid and supporting information showing that the rates comply with Section 272, or at least a precise and detailed description of the methodology that will be used in determining such rates. Indeed, the absence of any precise description on how rates will be determined itself calls into question the arms-length character of these transactions. Ameritech's failure to provide full disclosure of its transactions with ACI precludes any finding at this time that Ameritech will comply with Section 272.

IV. AMERITECH CANNOT SHOW THAT ITS ENTRY INTO THE INTEREXCHANGE MARKET AT THIS TIME WOULD BE CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

Finally, Ameritech's application should be denied because Ameritech has not shown, and cannot show, that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." See Section 271(d)(3). Ameritech's continuing resistance to meaningful competition means that Ameritech's interLATA entry would harm consumers in local and long distance markets alike. Ameritech's contrary arguments lack merit.

A. The State Of Local Competition Must Be Examined When Making The Public Interest Determination

As Ameritech acknowledges (Br., p. 62), the ultimate inquiry under the Section 271 "public interest" test must be whether Ameritech's entry into the interexchange market will promote competition. Under the plain language and legislative history of Section 271, this core question cannot be answered merely by considering whether Ameritech has complied with the competitive checklist and Section 272. Rather, the "public interest" test mandates an examination of the current state of local competition in Michigan.

First and foremost, the plain language of Section 271(d)(3)(C) directs the Commission to determine, in consultation with the Department of Justice, whether "the requested authorization is consistent with the public interest, convenience, and necessity." It is settled law that the impact on competition must be considered as part of the inquiry. Denver & Rio Grande Western R.R. Co. v. United States, 387 U.S. 485, 492 (1967); United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980). Indeed, given that the BOCs' ability to leverage their local service and exchange access monopolies lies at the heart of the ongoing interLATA restriction, it would be absurd to lift the interLATA quarantine without first determining whether the condition that necessitated the quarantine persists.

Second, the legislative history of the Act's public interest requirement makes clear that compliance with the competitive checklist is no substitute for actual, effective local competition. During deliberations over the Act, the Senate tabled -- by a vote of 68 to 31 -- an amendment providing that "[f]ull implementation of the [competitive] checklist . . . shall be deemed in full satisfaction of the public interest, convenience, and necessity requirement." 141 Cong. Rec. S7960, S7971 (daily ed. June 8, 1995).[23] Congress's deliberate decision to keep the "public interest" test as a separate and independent requirement establishes that satisfaction of the checklist cannot be deemed sufficient by itself to justify BOC long distance entry.

[23] The Conference Committee adopted this provision from the Senate Bill. See Conf. Rep. p. 149.

B. The Absence of Competition In Michigan Local Exchange Markets Demonstrates That Ameritech's Entry Into The Interexchange Market Would Be Inconsistent With The Public Interest, Convenience, And Necessity

1. There Is No Effective Competition In The Local Exchange Market

As the Commission recently recognized, the local exchange market remains "one of the last monopoly bottleneck strongholds in telecommunications." Non-Accounting Safeguards Order, ¶ 205. Michigan's local exchange market is no exception. Little more than nine months ago, the MPSC found that "[t]here is virtually no competition in local exchange markets at this time." MPSC case No. U-11053, p. 27 (Aug. 28, 1996). This statement remains true today. Ameritech's share of the Michigan local exchange market is at least 98.5%. Starkey Aff., ¶¶ 7, 15-17. As this overwhelming market share vividly illustrates, at the present time, there are no facilities-based providers, resellers, competitive access providers, or wireless providers capable of constraining Ameritech's ability or incentive to engage in anticompetitive behavior. Hubbard/Lehr Aff., ¶¶ 46-54; Bernheim/Ordover/Willig Aff., ¶¶ 21-30; Starkey Aff., ¶¶ 30-92.

In maintaining that local markets are now open to competition -- a position Ameritech has erroneously maintained for over a decade -- Ameritech relies upon the number of certified CLECs in Michigan; the number of completed arbitration agreements; the handful of firms who have entered Michigan's local exchange market, and the alleged plans of these firms (and of other firms that have not even entered the market) to provide more extensive local service in the future. Because the combined market share of all CLECs providing local service in Michigan is no more than 1.5%, there can be no plausible argument that any of these firms are currently effective competitors of Ameritech. Ameritech's most recent argument that the local market is "irreversibly" open to competition therefore rests on the specious premise that CLECs with little or no market share have the latent capacity to emerge as effective competitors in the future.

This reliance on future local exchange competition to gain entry now into long distance service conflicts with both law and sound economic principles. One of the principal goals of the Act is to create competition in local exchange markets. But the Act nowhere provides that the promise of such competition alone constitutes a basis for authorizing BOC entry into in-region interLATA services. Indeed, the strict requirements of Section 271 belie any such suggestion. Moreover, the economic reality is that potential competition will not act as an effective competitive constraint so long as there are entry barriers into the relevant market. Baumol Aff., ¶ 30. There clearly remain barriers in the Michigan local markets (see Hubbard/Lehr Aff., ¶¶ 55-77; Baumol Aff., ¶¶ 27-32; Bernheim/Ordover/Willig ¶¶ 25-30), as reflected in the absence of competition in those markets.

Furthermore, it is, at best, uncertain when effective competition will emerge in Michigan local exchange markets, in light of Ameritech's own efforts to stymie the growth of local competition. While Ameritech cites Brooks Fiber as a principal example of a competitor currently operating in the market, Ameritech omits mention of its campaign to delay Brooks Fiber's entry into the market for over two years. Even after Brooks Fiber signed a new interconnection agreement in July 1996 under Sections 251 and 252 of the Act, it continues to report numerous operational difficulties at the hands of Ameritech. Puljung Aff., ¶¶ 30-32.

The best evidence of the uncertain state of future competition, however, is the current state of competition in Michigan.[24] Ameritech heralds the efficacy of the Act's unbundling

[24] See In the Matter of SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121, Evaluation of the United States Department of Justice, p. 44 (May 16, 1997) ("DOJ Comments") ("Actual evidence of competition is much more persuasive and informative than theoretical claims that markets are open to entry, for there have been erroneous predictions of the imminence of local competition ever since the AT&T (continued...)

provisions and current state and federal regulations as fully adequate to assure the explosion of vigorous local competition. This bold pronouncement is unsupported by evidence of any significant actual competition today.

2. Ameritech's Premature Entry Into The Interexchange Market Would Provide Ameritech Incentive And Opportunity To Harm Competition

Premature entry would eliminate the incentive Ameritech otherwise has under Section 271 to cooperate in opening Michigan local exchange markets to competition. Local competition will emerge only if Ameritech genuinely cooperates with potential rivals in the development of the complex technical arrangements, such as OSS, that the Act requires. Once Ameritech is granted interLATA authority, however, its overriding incentive will be to impede the development of local competition, both to protect the monopoly revenues it enjoys from local exchange and exchange access services, and to maintain its anticompetitive advantages over other carriers that would otherwise seek to provide bundles of local and long distance services in competition with it. Hubbard/Lehr Aff., ¶¶ 87-106; Bernheim/Ordover/Willig Aff., ¶¶ 34-43; Bork Aff., ¶ 20.

Granting Ameritech's application now would therefore immediately create a second monopoly in addition to Ameritech's current monopoly over local exchange service -- a monopoly over the provision of bundled packages consisting of Ameritech's local service and long distance service (which Ameritech could immediately buy at wholesale discounts and resell). Because Ameritech has not yet complied with the competitive checklist and meaningful entry into the local markets is not yet feasible, Ameritech would be the only carrier with the opportunity to offer end-to-end service in significant volumes, and would be able to foreclose

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[24] (...continued)
divestiture"); Affidavit of Marius Schwartz filed in support of DOJ Comments, ¶ 20 ("By far the best test of whether the local market has been opened to competition is whether meaningful local competition emerges.").

competition for the subscribers that would find that offering attractive. Hubbard/Lehr Aff., ¶ 95; Bernheim/Ordover/Willig Aff., ¶ 61.

Ameritech also could harm long distance competition through price squeezes and cross-subsidization. Hubbard/Lehr Aff., ¶¶ 92-94, 97; Baumol Aff., ¶¶ 14, 41; Bernheim/Ordover/Willig Aff., ¶¶ 60-61, 84-88. Ameritech's principal response to the prospect of cross-subsidization is to note (Br., pp. 78-81) that any cross-subsidy would be highly unlikely to drive all existing long-distance carriers out of business. But that is beside the point. Cost misallocations of this sort are anticompetitive regardless of whether other carriers are driven to bankruptcy, both because they raise rates to local customers and because they divert long-distance customers to the BOC even when the BOC is the less efficient alternative. Bernheim/Ordover/Willig Aff., ¶ 34.

Ameritech would also have powerful incentives to discriminate in the pricing and provisioning of monopoly exchange access services to its "captive" long distance competitors, so as to raise their costs and degrade the quality of their service. Hubbard/Lehr Aff., ¶¶ 55-77; Baumol Aff., ¶¶ 36-47; Bernheim/Ordover/Willig Aff., ¶¶ 44-83; Economides/Mayo Aff., ¶¶ 10-14. Such discrimination would allow Ameritech both to expand its share of the long distance market by disadvantaging carriers that provide "stand alone" long distance service, and to protect its local market and customer base from competitors seeking to provide bundled long distance and local services. See Notice of Proposed Rulemaking, Non-Accounting Safeguards, ¶ 139 (rel. July 18, 1996) ("To the extent customers value 'one-stop shopping,' degrading a carrier's interexchange service may also undermine the attractiveness of the carrier's interexchange/local exchange package and thereby strengthen the BOCs' dominant position in the provision of local exchange service").

Ameritech's anticompetitive conduct would be exceptionally "difficult to police, particularly in situations where the level of the BOC's 'cooperation' with unaffiliated . . . carriers is difficult to quantify." Id.; see also Hubbard/Lehr Aff., ¶¶ 67, 69; Allen/Gropper Aff., ¶¶ 14, 34-49, 55-66, 71, 76; Bernheim/Ordover/Willig Aff., ¶¶ 89-108. Ameritech claims (Br., p. 89) that discrimination would be a virtual impossibility because "if Ameritech were to engage in systematic misconduct so pervasive as to impede competition . . ., it would be obvious to its competitors and to regulatory authorities," and if, on the other hand, "Ameritech's conduct were so subtle as to evade competition by competitors that have every incentive to complain, . . .that conduct could have no impact on competition." Such rhetoric entirely misses the central point about the limitations of regulation and competitor vigilance: The problem confronting regulators and competitors is not that discrimination would be difficult to observe. The problem, rather, is that it is extremely costly and nearly impossible to prove that cross-subsidies, cost shifting or service degradation is the product of anticompetitive discrimination rather than justifiable business practice. Bernheim/Ordover/Willig Aff., ¶¶ 95-96; Hubbard/Lehr Aff., ¶¶ 67, 69; Baumol Aff., ¶ 42; Allen/Gropper Aff., ¶¶ 34-42, 47, 55-57; Bork Aff., ¶¶ 24-29.

In sum, for so long as Ameritech's competitors remain critically dependent upon access and interconnection to Ameritech's network, Ameritech can engage in numerous forms of discrimination that cannot be forestalled by regulation. It therefore cannot be in the public interest to admit Ameritech into the long distance market until the local market is effectively competitive.

C. Because The Interexchange Market Is Already Vigorously Competitive, Ameritech's Claims Of Likely Consumer Benefits From Its Entry Are Baseless

Ameritech maintains that the long distance market today is a "tight oligopoly," and therefore that its entry into the market will have a substantial competitive impact. Preliminarily, it is quite remarkable that Ameritech could suggest that the local markets in which it retains at least a 98.5% market share are competitive, while asserting that the long distance market in which numerous facilities-based and non-facilities based carriers fight openly over customers is not competitive. No single standard could possibly generate both conclusions.

In all events, both conclusions are false. As discussed above, Ameritech retains monopoly control of the Michigan local exchange market. In sharp contrast, the long distance market exhibits the hallmarks of a vigorously competitive market: hundreds of new entrants; declining market share of the formerly dominant carrier AT&T; excess capacity; a high rate of customer churn; and falling prices.

The long distance market today is characterized by intense rivalry among several hundred aggressive competitors. Hubbard/Lehr Aff., ¶¶ 22-45; Bernheim/Ordover/Willig Aff., ¶¶ 109-114. Since divestiture, AT&T's share of toll revenue dropped from 87.7% in the fourth quarter of 1984 to 53.8% by the fourth quarter of 1996, with more than three quarters of AT&T's losses between the fourth quarter of 1990 and the fourth quarter of 1996 going to the hundreds of smaller interexchange carriers. Bernheim/Ordover/Willig Aff., ¶¶ 110-112. It is simply preposterous to suggest that these hundreds of firms, widely differentiated by size and geographic scope, could tacitly collude or engage in oligopolistic forbearance.

The competitive significance of the hundreds of interexchange firms, moreover, is heightened by the long distance market's widespread excess capacity (id., ¶¶ 115-116), and

evidenced by the frequency with which customers switch carriers (Pitsch Aff., ¶¶ 17-18), and the sharp price declines since divestiture. Indeed, since divestiture long distance prices have plummeted 60% in real terms, and 37% net of access. Bernheim/Ordover/Willig Aff., ¶ 118; Hubbard/Lehr Aff., ¶ 31. The decline in prices has not been limited to the highest volume callers. To the contrary, as the Commission has found, the "average best price" for all categories of residential customers divided by calling volume fell from 1991 to 1995. Non-Dominance Order, 11 FCC Rcd. at 3363 (Appendix A, Table 1).[25]

Thus, Ameritech's assertions that AT&T's rates have risen relative to costs, and notwithstanding significant reductions in access charges (see Br. 65-66; MacAvoy Aff., ¶¶ 12, 40-63), are simply false. They directly conflict with the Commission's findings, and they ignore the data that conclusively show that rates paid by consumers have declined more than access charge reductions precisely because of the intense competition in that market. Bernheim/Ordover/Willig Aff., ¶¶ 133-219; Hubbard/Lehr Aff., ¶¶ 107-134.[26]

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[25] The FCC's data showed a slight increase in nominal terms for the customers with the smallest calling volumes, but even that segment experienced a decline in real terms.

[26] Ameritech's contention (Br., pp. 65-66) that price-cost margins have been rising and converging relies heavily upon Professor MacAvoy's putative calculations of these margins. His calculations twice before have been submitted to the Commission by BOCs and found to be "inconclusive." See Second Report and Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace, ¶123, CC Docket No. 96-61 (rel. Oct. 31, 1996); Non-Dominance Order, 11 FCC Rcd. at 3314. Throughout the years in which he has unsuccessfully pressed his analysis, Professor MacAvoy has consistently refused to provide his underlying data and programs, and therefore it is impossible to replicate his work. Hubbard/Lehr Aff., ¶ 121; Bernheim/Ordover/Willig Aff., ¶ 158-166. Even without his data, however, it is clear that his work founders on both factual and theoretical levels. Professor MacAvoy's putative "prices" far exceed what long distance customers actually pay, and his "costs" substantially understate the costs long distance carriers actually incur. Hubbard/Lehr Aff., ¶ 121-133; Bernheim/Ordover/Willig Aff., ¶ 172-211.